LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 18 1974
MICHAEL RODAK, JR., CLERK

Supreme Court Of The United States

OCTOBER TERM, 1974

No. 74-294

MITCHELL WATSON, MENIFEE WATSON,
IDA MAE MULLINS, JUDGE WATSON,
OLGA WATSON, MANILEA ROWE and
RANDOLPH WATSON - - - - -Petitioners

versus

KENLICK COAL COMPANY, INC.,
TIP TOP COAL COMPANY, INC.,
SHERMAN BAILEY, LEXIE BAILEY,
J. W. HOWARD and
FLORENCE HOWARD - - - - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM H. ALLISON, JR.
3208 West Broadway
Louisville, Kentucky 40211
Attorney for Petitioners

LAWYERS PRINTING CO., P. O. BOX 7742, LOUISVILLE, KY. 40207

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1- 2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2- 3
STATEMENT OF THE CASE	3- 5
REASONS FOR GRANTING THE WRIT	6-38
I. This Court should grant certiorari to consider whether a pervasive state regulation of the coal companies' strip mining activities coupled with state court decisions that interpret the broad form deed in such a manner that gives the coal companies a right to destroy the surface of the land in the process of taking coal from beneath the land and thereby granting the coal company a privileged status, constitutes state action	6-29
II. This Court should grant certiorari to consider whether strip mining which destroys the surface of the land, without the surface owner's consent, and where no compensation is paid to the surface land owner, constitutes an unjust taking without just compensation under the Fifth Amendment to the United States Constitution	30-38
CONCLUSION	38
APPENDIX	1a-34a
A - Opinion of the Court of Appeals	1a-19a
B - Opinion of the District Court	21a-27a
C - 1974 Kentucky General Assembly House Bill No. 9	29a-34a

CASES CITED

PAGE

Adickes v. *S. H. Kress & Co.*, 90 S.Ct. 1598 ... 28
A. J. Croley v. *Round Mountain Coal Co.*, 374 S.W.2d 852 (Ky. 1964) ... 10
Armstrong v. *United States*, 364 U.S. 40 (1950) 35
Barker v. *Mintz*, 215 P.2d 534 ... 23
Barrows v. *Jackson*, 346 U.S. 249 (1953) ... 20, 21
Barton v. *Wichita River Oil Co.*, 187 S.W.2d 1063 (1916) ... 24
Bell v. *Maryland*, 378 U.S. 266 (1964) ... 20, 28
Benton v. *U. S. Manganese Corp.*, 313 S.W.2d 839 ... 23
Blue Diamond Coal Co. v. *Neace*, 337 S.W.2d 725 (Ky. 1960) ... 9, 10
Blue Diamond Coal Co. v. *Campbell*, 371 S.W.2d 483 (Ky. 1963) ... 10
Brown v. *Croger Coal & Land Co.*, 107 S.E.2d 777 23
Buchanan v. *Watson*, 290 S.W.2d 40 (Ky. 1956) ... 9, 10, 26
Burton v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) ... 16, 28
Campbell v. *Campbell*, 199 S.W.2d 931 ... 23
Carson v. *Missouri Pacific Railroad Co.*, 209 S.W.2d 97 ... 23
Chicago, Burlington & Quincy Railroad Co. v. *Chicago*, 166 U.S. 226 (1897) ... 19
C'Note v. *City of New Orleans*, 177 U.S. 587 (1901) ... 34
Evans v. *Newton*, 382 U.S. 296 (1966) ... 21
Franklin v. *Callicoat*, 119 N.E.2d 688 ... 23
Friendship Cemetery v. *City of Baltimore*, 81 F.2d 51 (1951) ... 35
Griggs v. *Allegheny County*, 369 U.S. 84 (1962) 33, 37
Hadecheck v. *Sebassion*, 239 U.S. 394 (1916) ... 34

Hosey v. *Club Van Cortlandt*, 299 F.S. 501 21
Hunter v. *Erickson*, 393 U.S. 385 (1969) 29
Int'l Ass'n of Machinists v. *Street*, 367 U.S. 740 (1961) 29
Interstate Consolidated Street Railway Co. v. *Commonwealth of Mass.*, 207 U.S. 79 (1907) 35
Kodak Coal Co. v. *Smith*, 338 S.W.2d 548 (Ky. 1960) 10
Lombard v. *Louisiana*, 373 U.S. 267 (1963) 16-17
Lucas v. *Wisconsin Electric Power Co.*, 406 F.2d 638 16
Marsh v. *Alabama*, 326 U.S. 501 (1946) 16
Martin v. *Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968) 8, 11, 12, 21, 22, 24, 26, 27
Meredith v. *Allen Co. War Memorial Hospital Commission*, 397 F.2d 33 (1968) 17
Merrill v. *Manufacturers Light & Heat Co.*, 185 A.2d 523 23
Moose Lodge No. 107 v. *Irvis*, 407 US 173 (1972) 15, 17-18
Mugler v. *Kansas*, 123 U.S. 623 (1887) 33
Munn v. *Illinois*, 94 U.S. 113 (1870) 34
New Charter Coal Co. v. *McKee*, 191 A.2d 830 23
New York Times v. *Sullivan*, 376 U.S. 254 (1964) 20, 21
Nixon v. *Condon*, 286 U.S. 73 (1932) 28
Oresta, et al. v. *Romano Brothers*, 73 S.E.2d 622 23
Public Utilities Com. v. *Pollak*, 343 U.S. 451 .. 18, 19
Pumpelly v. *Green Bay Co.*, 13 Wall 166 (1871) 33, 35, 37
Railway Employees' Dep't. v. *Hanson*, 351 U.S. 225 (1950) 29
Reitman v. *Milkey*, 387 U.S. 369 (1967) 27, 28-29
Ritchie v. *Midland Mining Co.*, 347 S.W.2d 548 (Ky. 1961) 10
Seidenberg v. *McSorley's Old Ale House, Inc.*, 308 F.Supp. 1253 (U.S. Dist. Ct. S.D.N.Y., 1969) 17

Shelley v. *Kramer*, 334 US 1 (1948) 16, 19, 20, 21, 22, 28
Smith v. *Holiday Inn*, 336 F.2d 630 (1964) 17
Stewart v. *Chermicky*, 266 A.2d 259 25
Transportation Co. v. *Chicago*, 99 U.S. 635 (1878) 32
United States v. *Causby*, 328 U.S. 256 (1946) .. 33, 37
United States v. *Central Eureka Mining Co.*, 357 U.S. 155 (1968) 32, 35
United States v. *Kansas City Life Ins. Co.*, 339 U.S. 799 (1950) 33, 37
United States v. *Polino*, 131 F.Supp. 772 (N.D.W. Va.) 23, 25
United States v. *Willow River Power Co.*, 324 U.S. 499 (1946) 35-36
Village of Euclid v. *Ambler Realty*, 272 U.S. 365 (1926) 34
West Kentucky Coal Co. v. *Dilback*, 294 S.W. 478 (1927) 27
West Virginia-Pittsburg Coal Co. v. *Strong*, 42 S.E.2d 46 25
Wilkes-Barre Township School Dist. v. *Corgan*, 170 A.2d 97 ..... 23, 25
Wiser Oil Co. v. *Conley*, 346 S.W.2d 718 (1961) 26, 27

CONSTITUTIONAL PROVISIONS CITED

	PAGE
U. S. Const., Amend. I	18
U. S. Const., Amend. V	2, 4, 5, 16, 18, 22, 35, 36, 38
U. S. Const., Amend. XIV	3, 4, 5, 15, 20, 22

STATUTES CITED

	PAGE
28 U.S.C. §1331(a)	5
28 U.S.C. §2201	5
28 U.S.C. §2202	5
42 U.S.C. §1983	5
42 U.S.C. §1984	5
Ky. Acts, ch. 8, 1954	12
Ky. Acts, ch. 105, 1962	12
Ky. Acts, ch. 51, 1964	12
K.R.S. 350.100(1)	4
K.R.S. 350.028	13, 14
K.R.S. 350.032	13
K.R.S. 350.050	13
K.R.S. 350.060	13
K.R.S. 350.085	14
K.R.S. 350.090	14
K.R.S. 350.095	14
K.R.S. 350.130	14

REGULATIONS CITED

	PAGE
Ky. Strip Mine Regulations—5	14
Ky. Strip Mine Regulations—6	14
Ky. Strip Mine Regulations—7	15
Ky. Strip Mine Regulations—8	15
Ky. Strip Mine Regulations—9	15
Ky. Strip Mine Regulations—10	15
Ky. Strip Mine Regulations—11	15
Ky. Strip Mine Regulations—12	15

OTHER AUTHORITIES CITED

	PAGE
"Kentucky's Reclamation Program", *Ky. Engineer*, November, 1967	6- 7
H. Caudill, *Night Comes to the Cumberlands* (1963)	8
18 R.C.L. Mining & Minerals, Section 2	24
27 Cyc. Mining & Minerals, Section 532	24
17A C.J.S. Contracts §295 (1963)	25
Opinion of Attorney General, 70-563, August 24, 1970	30-32
Sax, "Taking & the Police Power", 74 Yale L.J. 36 (1964)	36

Supreme Court Of The United States

OCTOBER TERM, 1974

No._____

MITCHELL WATSON, MENIFEE WATSON, IDA MAE MULLINS, JUDGE WATSON, OLGA WATSON, NANILEA ROWE and RANDOLPH WATSON *Petitioners*

versus

KENLICK COAL COMPANY, INC., TIP TOP COAL COMPANY, INC., SHERMAN BAILEY, LEXIE BAILEY, J. W. HOWARD and FLORENCE HOWARD *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on June 21, 1974, affirming the denial of relief by the United States District Court for the Eastern District of Kentucky.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is set out in the Appendix, *infra.* p. 1a-19a. The

memorandum opinion and order of District Court denying relief is reported at 365 F.Supp. 456 and is set out in the Appendix, *infra.*, p. 21a-27a.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 21, 1974, Appendix A. p. 1a-19a. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Does a pervasive state regulation of the coal companies' strip mining activities coupled with state court decisions that interpret the broad form deed in such a manner that gives the coal companies a right to destroy the surface of the land in the process of taking coal from beneath the land and thereby granting the coal company a privileged status constitute state action? Is the broad form deed constitutional?

2. Does strip mining which destroys the surface of the land, without the surface owner's consent, and where no compensation is paid to the surface land owner, constitute an unjust taking without just compensation under the Fifth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV

"No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Watson family, petitioners, own land, except for the mineral rights therein, on the Laurel Fork of the Oakley Creek in Magoffin County, Kentucky. Respondents, J. W. Howard and Florence Howard, sold or leased certain mineral rights connected with petitioners' land to respondents Tip Top Coal Company, Inc., and Kenlick Coal Company, Inc. Respondent Sherman Bailey is president of Tip Top Coal Company, Inc., and Kenlick Coal Company, Inc., and respondent Lexie Bailey is the secretary of Tip Top Coal Company, Inc., and Kenlick Coal Company, Inc. Both coal companies are incorporated in the Commonwealth of Kentucky.

The coal companies have strip mined coal on the Watson Land without permission from the Watson family and under the authority of a broad form deed. The strip mining primarily took place from 1958 through 1971 and the coal companies presently have strip mining permits that will allow them to strip mine whenever they want. The strip mining activities of the coal companies have virtually destroyed the Watson land and made it unfit for agricultural and forest purposes. Sulfurous and other deleterious substances brought to

the surface by the mining operation have added to the destruction of the substance of the soil and timber. Mud, dirt, rocks, and debris have, as a result of the coal companies' mining operations, been washed and eroded onto petitioners' lower land and upon improvements and personal belongings. The surface of the land has been rendered unfit for use and the surface and subterranean water of the land has been poisoned. Furthermore, in contravention of Kentucky law, Kentucky Revised Statute (K.R.S.) 350.100(1), the respondents have taken no steps to reclaim any portion of the land in question destroyed by their mining practices.

The petitioners filed suit in the United States District Court for the Eastern District of Kentucky claiming they had been deprived of their property without due process of law in violation of the Fifth Amendment to the United States Constitution to their damage of five hundred thousand dollars ($500,000). The petitioners also alleged that the Commonwealth of Kentucky had unconstitutionally involved itself in the taking of their property without just compensation and without due process of law. The action by the state was violative of the due process provisions of the Fifth Amendment to the United States Constitution as applied to the state by the Fourteenth Amendment to the United States Constitution. The state had illegally involved itself in two ways. The state legislature has pervasively regulated the strip mining industry, including the respondents, by setting up a state regulatory agency, the Kentucky Division of Reclamation, and given it strong and wide-ranging powers. In addition the Kentucky Court of Appeals has in a long line of cases given

judicial sanction to the strip mining practices, such as respondents have engaged in, by holding that such strip mining practiced under authorization from a "broad form" deed is legal. The holdings of Kentucky's highest Court are in opposition to the rulings by almost every other state court and even in conflict with its own rulings in similar oil and gas rights situations.

The petitioners argued that federal jurisdiction arose over the acts complained of under the Fifth and Fourteenth Amendments to the United States Constitution, 28 U.S.C. §1331(a), 28 U.S.C. §2201, 2202, and 42 U.S.C. §1983, 1984. In addition to monetary damages, the petitioners sought an injunction against respondents' illegal mining practices. The District Court dismissed the petitioners' complaint for lack of subject matter jurisdiction (App. 21a-27a). The decision was affirmed by the Court of Appeals (App. 1a-19a).

Between the decision by the District Court and after briefs had been submitted to the Court of Appeals, but before oral arguments at the Court of Appeals, the Kentucky General Assembly passed on February 21, 1974, House Bill 9 (App. 29a-34a), to take effect January 1, 1975. This bill in effect said that strip mining would no longer be allowed without the written consent of the surface owner of the land to be mined.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A PERVASIVE STATE REGULATION OF THE COAL COMPANIES' STRIP MINING ACTIVITIES COUPLED WITH STATE COURT DECISIONS THAT INTERPRET THE BROAD FORM DEED IN SUCH A MANNER THAT GIVES THE COAL COMPANIES A RIGHT TO DESTROY THE SURFACE OF THE LAND IN THE PROCESS OF TAKING COAL FROM BENEATH THE LAND AND THEREBY GRANTING THE COAL COMPANY A PRIVILEGED STATUS, CONSTITUTES STATE ACTION.

The respondents have engaged in strip mining under the authority of a broad form deed. Strip mining differs from underground mining in that while underground mining removes the coal from beneath the earth's surface, strip mining is a method of removing coal from the earth which utilizes a removal of the overlying strata as the primary method of obtaining access to the coal. The coal companies are engaged in contour strip mining on the Watson land. Contour strip mining is explained by a former director of the Kentucky Division of Strip Mining and Reclamation.

> Contour Strip Mining is practiced in steep or mountainous country, such as is found in Eastern Kentucky. This method consists of removing the overburden above the coal seam by starting at the outcrop and proceeding along the hillside. After the exposed coal is removed in the original cut, additional cuts are made until the ratio of overburden to coal produced brings the operation to a halt. Contour mining creates a shelf, or bench, on the hillside. On

the inside it is bordered by the highwall, which may range from a few feet to more than 100 feet in height. The opposite side is a precipitous slope that has been covered by spoil material cast down the hillside. Unless stabilized, this spoil material can cause severe erosion and landslides. Elmore C. Grim, "Kentucky's Reclamation Program," *Kentucky Engineer,* November 1967, at 11-12.

While there is a disagreement as to when strip mining practices began in use, it is agreed by most all that the practice did not develop on a wide-spread scale until after World War II. Then the demand of low cost electricity coupled with the scientific and technological advancements developed more efficient and larger machinery for biting into the mountains of eastern Kentucky.

The conveyance instrument under which the coal companies have strip mined is commonly known as a broad form deed whereby the mineral estate is severed from the surface estate. In the present case the mineral estate was severed from the surface estate in 1905. Among the numerous rights that went along with the mineral estate were the right to "all coal mineral and mineral substances and products; all oils and gases," "all subterranean substances and products," "exclusive rights-of-way for any and all railroads," "pipe lines, telephone and telegraph lines that may hereafter be located on said land," "exclusive right to enter upon said land and drill thereupon for oil and gas," "use and operate the said land and surface thereof and any and all parts thereof, including the right to use, divert, dam and pollute water courses thereon," "and also the right to build, erect, alter, repair, maintain and operate upon

said land and at its option to therefrom remove, any and all houses, shops, buildings, tank, derricks, inclines, tipples, dams, coke-ovens, store and ware rooms, and machinery and mining and any and all equipment," "and the right to dump, store and leave upon said land any and all muck, bone, shale water or other refuse from said mines," "and the right to erect upon said land and maintain, use, repair and operate, and at their pleasure remove therefrom, any and all buildings and structures, and machinery and mining and any and all equipment, whether specifically enumerated herein or not." Also in exercising their right to the mineral estate the grantee was "released from any and all liability or claim of to the said parties of the first part, their heirs, representatives and assigns (surface owner), occasioned by or resulting directly or indirectly from such use or occupation . . . " (App. 3a-5a). This type of broad form deed is typical of the deeds that separated the mineral rights from the surface rights. See also H. Caudill, *Night Comes to the Cumberlands*, p. 72-75 (1963). One source has estimated that in ninety per cent of the land in the Eastern Kentucky counties of Bell, Harlan, Letcher, Perry, Knott, Pike, and Floyd title to the mineral estate has been severed from the general surface by these kind of deeds. In counties of Knox, Whitley, McCreary, Leslie, Lawrence and Morgan, a lesser percentage is similarly affected. Brief for appellants at p. 2, *Martin* v. *Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968). These type of mineral deeds are common throughout the coal fields of Pennsylvania, West Virginia, Ohio, and Tennessee and other states. Significantly though the broad form deed has been differently interpreted in

Kentucky than in any other state by the highest court in Kentucky.

In *Buchanan* v. *Watson*, 290 S.W.2d 40 (Ky. 1956) the Kentucky Court of Appeals first significantly interpreted the broad form mineral deed. The trial court had held that under the broad form deed coal could be removed by strip mining but damages had to be paid to the surface owner for destruction to the surface of the land and the timber thereon. After first affirming the decision of the lower court, on a Petition for Rehearing, the Kentucky Court of Appeals reversed its original decision and held that the owner of the mineral estate could strip mine without liability unless he exercised this power "oppressively, arbitrarily, wantonly or maliciously." *Buchanan* at p. 43. Even though the court recognized that the original parties to the broad form deed had not contemplated strip mining, stripping was permitted, the court ruled, since it was the only feasible and economical way to mine the coal; ambiguity in a deed is always construed strongly against the grantor; the all-inclusiveness of the deed and a waiver of surface damages created a dominant estate in the holder of the mineral estate; and the court concluded by saying,

> The validity of a waiver of damages has become so firmly established that it is a rule of property law governing the rights under many mineral deeds concerning much acreage in Eastern Kentucky. *To disturb this rule now would create great confusion and much hardship in a segment of an industry that can ill-afford such a blow.* (Emphasis added.) *Buchanan*, supra at 43-44.

In *Blue Diamond Coal Co.* v. *Neace*, 337 S.W.2d 725 (Ky. 1960), the Kentucky Court of Appeals further in-

terpreted the broad form deed. The Trial court in *Blue Diamond* believed that *Buchanan* would not last long and stated:

> The Court however, is of the opinion that . . . Buchanan v. Watson . . . is too harsh, and that the Court of Appeals will . . . modify or reverse that opinion. This court knows every Judge and Commissioner on the Court of Appeals and he knows that they are not cruel or cold hearted men, and it is his opinion that they, however, have not seen the havoc or devastation that has been brought and reaped upon many of the small property owners . . . and with very little, if any, effort on the part of the operators in alleviating or minimizing that havoc or distress . . . Record, p. 85; Brief for Appellant, p. 4, in the *Blue Diamond* case.

The Court of Appeals in *Blue Diamond* extended *Buchanan* and held that owners of mineral rights were immune from damages to the surface and minor improvements caused by auger mining even where underground mining was feasible. The court stated:

> Right or wrong, it would be a grave matter indeed for this court by overruling *Buchanan* now to upset property rights which have since vested in reliance upon it. *Blue Diamond,* supra, p. 728.

The Kentucky Court has reaffirmed the *Buchanan* decision in cases since *Blue Diamond* in *Kodak Coal Co.* v. *Smith,* 338 S.W.2d 548 (Ky. (1960); *Ritchie* v. *Midland Mining Co.,* 347 S.W.2d 548 (Ky. 1961); *Blue Diamond Coal Co.* v. *Campbell,* 371 S.W.2d 483 (Ky. 1963); *A. J. Croley* v. *Round Mountain Coal Co.,* 374 S.W.2d 852 (Ky. 1964).

The latest decision by the Kentucky Court challenging the interpretation of the broad form deed was *Martin* v. *Kentucky Oak Mining Company*, 429 S.W.2d 395, (Ky. 1968). The deed in *Martin* had a waiver of damages similar to the present case. The lower court had ruled that the mineral owner could remove coal by strip or auger mining methods but that he must pay damages to the surface owner for any destruction of the surface. The main contention of the owners of the surface rights was,

> . . . that the broad form deed does not mean, and could not reasonably have been intended to mean, when it grants to the mineral grantee the right to use the surface of the land "as may be necessary or convenient to the exercise and enjoyment of the property rights and privileges hereby . . . conveyed," that the use, regardless of old or new methods, could be such as to destroy the value of the surface for agricultural or residential purposes. *Martin* at p. 397.

A four-to-three majority of the Kentucky Court ruled that the owner of the mineral right was entitled to strip mine, and furthermore, was not liable to the owner of the surface rights for damages to the surface unless the mining was conducted in a "wanton, malicious or arbitrary manner." As to the arguments of the surface owners the majority stated,

> . . . they do not have the overwhelming force necessary to prevail against the lone entrenched rule of our previous cases in reliance upon which property rights have vested. *Martin* at 399.

The dissent in *Martin* emphasized that the main question in interpreting the deed was the intention of

the parties who signed the deed in 1905 and whether the practice of strip mining was in use. They contended that strip mining was neither heard of nor dreamed of in 1905 and therefore the mineral rights owner had no right to remove coal by stripping. In revealing language, the dissent stated:

> I am shocked and appalled that the Court of last resort in the beautiful state of Kentucky would ignore the logic and reasoning of the great majority of other states and lend its approval and encouragement to the diabolical devastation and destruction of a large part of the surface of this fair state without compensation to the owners thereof. *Martin* at 402.

The *Martin* holding represents the present state of Kentucky law concerning the legality and scope of the broad form deed.

Kentucky's legislative body, the General Assembly, passed the first strip mine legislation for the state in 1954 (Ky. Acts ch. 8 at 19, 1954), with the main requirements being that strippers must cover the face of the coal and grade spoil banks where practicable. Subsequent amendments to the law were passed in 1962 (Ky. Acts, ch. 105 at 400, 1962) and 1964 (Ky. Acts, ch. 51 at 228, 1964). Then in 1966 the basic strip mining law that is in effect today was passed by the Kentucky General Assembly. In 1972 there were some changes made to the 1966 law. The law is all-encompassing and practically totally regulates the strip mining industry. A Reclamation Commission in the Kentucky Department of Natural Resources, was first authorized but in 1972 the Commission was abolished and a new Department of

Environmental Protection was set up with a Division of Reclamation within it. The Department of Environmental Protection has the power to conduct investigations, hearings and adopt regulations concerning the strip mining industry; to order remedial measures for those not complying with the law, and to revoke strip mining permits when there is non-compliance. K.R.S. 350.028. K.R.S. 350.032 gives the Department of Environmental Protection the power to seek judicial enforcement of its subpoenas and also authorizes judicial review of any rulings by the department. The Division of Reclamation within the department supervises and enforces the strip mining laws; examines and approves plans and specifications submitted by strip mine operators as to their method of operation, backfilling, grading and for the reclamation of area stripped; orders suspension of strip mining permits for failure to comply with laws and regulations; and orders stopping of any mining operation that has begun without first securing a permit to strip from the division. K.R.S. 350.050. Unless the operator first obtains a permit, as well as gives complete information as to the location of the land, the owners of the surface rights, the owners of the coal to be mined, his address, along with a comprehensive United States geological survey topographic map, he will be denied a stripping permit. K.R.S. 350.060. A fee is required for the permit as well as a performance bond conditioned on compliance with state laws and regulations. Permit applications are to be denied if the mine operator cannot fulfill the law requirements as to backfilling, grading or reclamation; landslides or acid water pollution cannot be prevented; houses, schools, churches, etc. will be

threatened. K.R.S. 350.085. Comprehensive plans must be submitted to insure that the method of operation, backfilling, grading and reclamation of the area does not damage the public and their property, roads and streams. K.R.S. 350.090. After the backfilling and grading has been completed and approved by the division the operator shall restore the land by planting trees, shrubs, grasses and legumes on the land stripped. K.R.S. 350.095. K.R.S. 350.130 sets forth the procedure by which operators are informed of their noncompliance with the strip mine laws and regulations and the fact that if an operator has repeatedly been in noncompliance more than three times, he will not be issued any additional permits.

The 1974 Kentucky General Assembly passed additional strip mine legislation to go into effect January 1, 1975. The new legislation broadens the state regulatory scheme over strip mining, but the most important new regulation prohibits strip mining where the surface owners refuse to give their written consent (App. 31a-32a).

The coal company respondents will be prohibited from strip mining on the Watson land after January 1, 1975, but this will not compensate for the land destruction prior to the effect of the new law.

Also pursuant to K.R.S. 350.028 additional and more comprehensive regulations have been authorized by the Division of Reclamation. The division has promulgated regulations more specifically defining required access roads to the area to be stripped (Strip Mine Regulation (SMR-5), backfilling, grading, reclamation and methods of operation (SMR-6), permits and reclama-

tion plans (SMR-7), vegatative cover and standards for evaluating vegatative cover (SMR-8), pre-planning for contiguous mining areas (SMR-9), blasting (SMR-10), water quality (SMR-11), and water impoundments (SMR-12)).

This Court should grant certiorari and decide whether the all-encompassing state regulations over the strip mine industry coupled with state court decisions on all fours with the present factual situation upholding the broad form deed and giving the mineral rights owner preference over the surface owner in state action. This issue needs to be decided by this Court not only for the sake of the present litigants but for all land owners in Kentucky and perhaps other states who have had their land destroyed by coal companies. All land owners in Kentucky, especially eastern Kentucky, whose mineral estate has been taken from them by a broad form deed, need to receive compensation.

In the past the courts have extended the meaning of state action to include many things that it would not obviously include. The extension of this doctrine has undertaken to extend the coverage of the Fourteenth Amendment to actions which were previously thought of as private action by private citizens. The test of state action has never been hard and fast.

> Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance . . . cases make clear that the impetus for the forbidden discrimination need not originate with the state if it is State action that enforces privately originated discrimination. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 173, (1972).

Other cases have helped to define the illusive doctrine.

> A private person does not act under color of state law unless he derives some "aid, comfort, or incentive," either real or apparent from the state . . . . We believe that affirmative support must be significant, measured by its contribution to the effectiveness of defendant's conduct, or perhaps by its defiance of conflicting national policy to bring the statute (fourteenth) into play. *Lucas* v. *Wisconsin Electric Power Co.*, 406 F.2d 638, 655, 656.

Prior to 1943, this doctrine had already been extended to include the acts of state officials under the color of law doctrine, and the acts of private persons who were instrumentalities of the state as state action. (The Impact of *Shelley* v. *Kramer* on the State Action Concept, 44 Cal. L. Rec. 718, 719; 1956.) Later the instrumentality theory went so far as to include the acts of a private corporation as state action where the private corporation governed the citizens so as to restrain their fundamental liberties (*Marsh* v. *Alabama*, 326 US 501; 1946), and to include the acts of a restaurant owner where the restaurant space had been leased by the state through the local parking authority (*Burton* v. *Wilmington Parking Authority*, 365 US 715; 1961).

Where state licensing is involved the acts of the licensee are state action and therefore if the licensee violates the taking clause of the Fifth Amendment, the state is responsible for these violations. In *Lombard* v. *Louisiana*, 373 US 267 (1963), Justice Douglas concurring stated that,

> State licensing and surveillance of a business serving the public also brings its service into the public

> domain. This restaurant needs a permit from Louisiana to operate; and during the existence of the license the state has broad powers of visitation and control. This restaurant is thus an instrumentality of the state since the state charges it with duties to the public and supervises the performance. *Lombard*, supra, pp. 280-283.

This is exactly what we have in the present situation where the state grants permits to operate, can revoke the permits for non-compliance with state laws and regulations, approves plans for strip mining operations, orders and supervises reclamation, requires a performance bond conditioned on compliance, and a host of other compulsory state requirements before the strip miner can operate in the state. If an operator is in non-compliance more than three times, the state will deny him the right to strip mine. So extensive is the state involvement that strip mining is no longer a right but a privilege granted by the state. See also *Seidenberg* v. *McSorley's Old Ale House, Inc.*, 308 F. Supp. 1253 (USDC, SDNY, 1969); *Smith* v. *Holiday Inn*, 336 F.2d 630 (1964); *Meredith* v. *Allen Co. War Memorial Hospital Commission*, 397 F.2d 33 (1968).

In *Moose Lodge*, supra, this Court held that possession of a state liquor license by a fraternal lodge (private club) that engaged in racial discrimination did not constitute state action. The argument that the state was significantly involved in the discrimination failed because

> . . . the Pennsylvania Liquor Control Board plays absolutely no part in establishing or enforcing the membership or guest policies of the club which it

> licenses to serve liquor . . . *Moose Lodge*, supra at 175.
>
> However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination . . . at 176.
>
> Operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the state in the discriminatory guest policies of Moose Lodge so as to make the latter state action within the ambit of the Equal Protection Clause of the Fourteenth Amendment . . .at 177.

There is state action in the case at bar precisely because the state regulatory practices are specifically directed at the destructive aspects of strip mining and not a regulation by the state of a peripheral aspect of strip mining. In the case at bar there is significant state regulation of the specific practice that is alleged to be illegal. In *Moose Lodge* there was no state approval in any way of the racial discrimination by the club. In the case at bar the state approves the strip mining by allowing it to continue and certainly the Kentucky Court of Appeals approves of such mining by granting favorable and even preferential rulings to the industry.

In *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, where a privately owned public utility that was regulated by the Public Utilities Commission was sued for installing music in its street cars, this Court held there was sufficient government involvement to make the First and Fifth Amendments applicable to the private utility's action. The *Pollak* situation is very similar to the case at bar. Both the utility and the coal

companies were private corporations. Both were heavily regulated by the state. The key aspect of regulation by the state in *Pollak* was regulation of the alleged harm, that being the music. The state approved of the music on the street cars. It was the music that the two street car riders disapproved of and sued to eliminate. Similarly it is the strip mining practices that the plaintiffs are trying to stop that the state has approved and encouraged.

In regard to state court action it was decided as early as 1878 that,

> If compensation for private property taken for a public use is an essential element of due process of law as ordained by the fourteenth amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that amendment. *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago,* 166 US 226, 235 (1897).

The case of *Shelley* v. *Kraemer,* 334 US 1 (1948), seventy years later represented a major step in the extension of the state Court action doctrine. In this case the owners of property with racially restrictive convenants were suing to enjoin the Negroes who had bought homes which were subject to the same racially restrictive covenant from taking possession and title of the homes they had bought.

> Here the particular pattern of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance by the terms of agreements among private individuals. *Shelley,* at 13.

> Nor is the amendment ineffective simply because the particular pattern of discrimination which the state has enforced, was defined initially by the terms of a private agreement. *Shelley*, at 20.

The Court took a major step here in determining that judicial enforcement of private discrimination is prohibited by the Fourteenth Amendment and is state action. The Court also stated,

> But the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common law rule formulated by those courts may result in the denial of rights guaranteed by the Fourteenth Amendment even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. *Shelley* at 17.

Later cases have also upheld this extension of the state court action doctrine. *Barrows* v. *Jackson*, 346 US 249 (1953) affirmed the holding in the *Shelley* case, saying that damages could not be sustained against a co-covenator who sold to a Negro. *Bell* v. *Maryland*, 378 US 266 (1964), held that there was state action where a state court upheld the conviction for trespass of twelve Negroes who attempted to integrate a segregated private luncheon counter, and in *New York Times Co.* v. *Sullivan*, 376 US 254 (1964), the Court found that the state rather than Sullivan had deprived the New York Times of freedom of speech by upholding Sullivan's

claim for libel against the New York Times. It was found to be sufficent grounds for state action that the Common Law rule was applied to mediate conflicting claims of right between private parties. In *Evans* v. *Newton*, 382 US 296 (1966), this Court found that there was state action when the state court substituted private trustees for a park that was for the needy run by city trustees. A later Federal Appeals Court aptly summarized the state court action principle.

> There is no doubt today that judicial action in private disputes is a form of state action required for application of the amendment. In *Shelley* v. *Kraemer* and *Barrows* v. *Jackson*, the Supreme Court found that equal protection would be denied if a court enforced, or awarded damages for the breach of an agreement under which property would not be sold to non-caucasians. The application of a rule of law such as the common law of libel applied by the lower courts in *New York Times Co.* v. *Sullivan*, which penalizes a person for the exercise of a constitutional right is a violation of the fourteenth amendment and a court cannot award damages under it. *Hosey* v. *Club Van Cortlandt*, 299 F.S. 501, 506.

It is contended that the case *Martin* v. *Kentucky Oak Mining Co.*, 429 S.W.2d 395 (1968), decided by the Kentucky State Court of Appeals, constitutes state action which makes the state responsible for the acts of the strip mine operators. Without the authority of *Shelley* and the cases that followed it, such a contention would be ridiculous, but based on such authority the argument is valid. The *Martin* case held that under the broad form deed which had conveyed the mineral rights to the

defendant of the property owned by the plaintiff, the defendant could use the method of strip mining to remove the minerals although it destroyed the plaintiff's property and although this method of removal of minerals had not been contemplated at the time the mineral rights were conveyed. As a result of this decision, the coal company respondents are permitted to strip mine under the broad form deed and this strip mining results in such harm to the Watson family that it constitutes a taking of property in violation of the Fifth and Fourteenth Amendments. This taking of property is a state taking for the following reasons. First, it has been determined that a final judgment of the state court, under the authority of which the property is in fact taken, is to be deemed the act of the state. In *Shelley* this holding was determined pursuant to a state statute, but it is logical that state action can also be found pursuant to a private agreement that is enforced by the highest state court where this enforcement results in a violation of the Fourteenth Amendment. In the case at hand, the state court has enforced a private agreement in such a way as to result in a violation of the Fourteenth Amendment by way of the Fifth Amendment taking clause. The necessary affirmative action by the state can also be found in this state court decision as the dissent in the *Martin* case so well stated,

> I am shocked and appalled that the court of last resort in the beautiful State of Kentucky would . . . lend its approval and encouragement to the diabolical devastation and destruction of a large part of the surface of this fair state without compensation to the owners thereof. *Martin*, supra. Hill dissent at 402.

In addition to the preceding arguments showing state involvement, the Kentucky Court of Appeals has further enabled and enhanced the efficacy of the challenged activity by enlarging the legal rights of strip miners under the broad form deed, and in effect legalized the broad form deed. No other state gives strip miners such a free hand under the broad form deed and allows this kind of mining. See *Wilkes-Barre Township School District* v. *Corgan*, 170 A.2d 97; *Merrill* v. *Manufacturers Light & Heat Co.*, 185 A.2d 573; *New Charter Coal Co.* v. *McKee*, 191 A.2d 830; *Oresta, et al.* v. *Romano Brothers*, 73 S.E.2d 622; *Brown* v. *Croger Coal & Land Co.*, 107 S.E.2d 777; *United States* v. *Polino*, 131 F.S. 772 (N.D.W. Va.); *Franklin* v. *Callicoat*, 119 N.E.2d 688; *Barker* v. *Mintz*, 215 P.2d 534; *Benton* v. *United States Manganese Corp.*, 313 S.W.2d 839; *Carson* v. *Missouri Pacific Railroad Co.*, 209 S.W.2d 97; *Campbell* v. *Campbell*, 199 S.W.2d 931. If the Watson family land was in West Virginia or Pennsylvania, they could legally prevent the coal companies from stripping on their land. There is a strong disagreement among states as to the legality and validity of the broad form deed.

What the Kentucky court has done is to grant a right that was not there to begin with and legalize the destruction and taking of surface owners' property. The parties to the broad form deed in the present case never intended nor contemplated strip mining methods being used on the land and in effect destroying the land. Nowhere in the deed was the word strip mining mentioned (App. 3a-5a). What was mentioned in the deed was the word "mining" and it is incumbent to determine

what the ordinary meaning of the word was when the deed was signed. At the turn of the century, the state of technology was such that the surface and mineral estates were compatible since underground mining was the primary method of mining. As the dissent in *Martin* at 401 stated, strip mining was not contemplated nor in practice at the time of the signing of these deeds.

Authorities contemporaneous with the period show what kind of mining methods were used. In 18 R.C.L. Mining and Minerals, Section 2 (work published in 1917) the following appears:

> A "mine" in its specific sense is a work for the excavation of minerals, by means of *pits, shafts, levels, tunnels,* et cetera, as opposed to a quarry where the whole excavation is open. It has been said that whether any excavation be a mine or not depends on the mode in which it is worked, and not on the substance obtained from it. As originally used, the word "mine" was *exclusively connected with underground* workings . . . (Emphasis added.)

In 27 Cyc. Mining and Minerals, Section 532 (work published in 1907), the following appears:

> The primary meaning of the word "mine", standing alone, is an underground excavation in the earth from which metallic ores or other mineral substances are taken by digging.

In *Barton* v. *Wichita River Oil Co.,* 187 S.W. 1043 (1916), Webster's primary definition of the word "mine" is said to be "an excavation, properly underground, for digging out some useful product, as ore, metal or coal." It is clear from these authorities that at the time of the

signing of the deed the ordinary or popular definition of mining was confined to underground excavations. In 1905 the term "mining" did not embrace the process of extraction of coal by stripping. The fact that one method of mining today is stripping does not mean that the term "mining" embraced this method in 1905. Cases in states other than Kentucky hold that any deed dated prior to the introduction of strip mining into an area which does not specifically authorize the practice and which severs the mineral estate from the surface estate cannot be held to allow strip mining. In *United States* v. *Polino,* supra, the Federal Court construed a 1917 deed which granted surface rights to the government but reserved the mineral rights to the grantor. In refusing to permit the mineral owner to strip mine, the trial judge stated:

> In order for a usage or custom to affect the meaning of a contract in writing because it is within the contemplation of the parties thereto, it must be shown that the usage or custom was one generally followed at the time of the contract's execution. At 775.

See also *West Virginia-Pittsburg Coal Co.* v. *Strong,* 42 S.E.2d 46, 49; *Stewart* v. *Chermicky,* 266 A.2d 259; and *Wilkes-Barre Township School District* v. *Corgan,* supra. By every rule of contract construction, including construction of deeds, the intention of the parties is the ultimate question for the interpreter. 17 A C.J.S. *Contracts* §295 (1963). It is inconceivable that the surface owners would have authorized the destruction of their land.

The Kentucky Court in granting the strip mine operators dominant authority over surface owners has

given them a privileged position even superior to individuals who own oil rights. In *Wiser Oil Co.* v. *Conley*, 346 S.W.2d 718 (1961), the court held that parties to a 1917 lease intended that the oil should be produced by drilling in a customary manner prevailing when the lease was executed, and the holders of the lease would be liable to the surface owner for damage to the surface of the land and coal thereunder resulting from the use of a "water-flooding" method to increase the oil production. "Water-flooding" was a new method of extracting oil that was highly destructive to the surface. The court held that the right "to use all means and appliances on or off these premises to secure and facilitate the production of the oil and gas" and the fact that all of the oil was conveyed did not give the mineral holder the right to destroy the surface. *Wiser* at 720. The court in Wiser stated:

> Even though appellants assert that the water flooding process was known prior to March 10, 1917, the date of the execution of the lease, and it was employed to some extent in other states before that time, we conclude that it was the intention of the parties that oil should be produced by drilling in the customary manner that prevailed when the lease was executed. Any exemption from liability would, therefore, be limited to the damage which might be caused by this contemplated means of bringing oil to the top.

The Kentucky Court in *Martin* fell far short in reconciling the differences with the *Wiser* decision.

> It is suggested that the court in *Wiser Oil Co.* v. *Conley* did depart from the principles of *Buchanan*

> v. *Watson*, in respect to oil rights . . . Perhaps *Wiser* is distinguishable from *Buchanan* on some basis other than that stated in the opinion in *Wiser*, or perhaps it is a departure from *Buchanan*. In any event we do not feel compelled in this opinion to explain, justify, reconcile or distinguish *Wiser*. The Court has decided to adhere to *Buchanan* whether or not it conflicts with *Wiser*. *Martin* at 399.

There is no other way to justify the different rulings except that the Kentucky Court has decided to give strip mining interests a privileged position. Until the advent of massive strip mining in the State of Kentucky the surface owner did not have to worry about his land being destroyed by mining practices. Mining practices did not have that right up until that time. The Court of Appeals of Kentucky stated in 1927:

> The right to mine is subservient to the right of the surface owners to have the surface maintained in its natural state free from subsidence or partings of the soil and this right of support is absolute and not dependent upon any question of negligence. *West Kentucky Coal Co.* v. *Dilback*. 294 S.W. 478, 479 (1927).

It is only after World War II when the strip mining industry became powerful in the State that the Kentucky Court of Appeals legalized such practices under the broad form deed.

What the Kentucky State Government has done through its judiciary, by judicial interpretation, and its legislature, by regulating the activity, is allocate certain powers in support of private individuals and private entities that they would not have had without the support of the branches of state government. See *Reitman* v.

Mulkey, 387 US 369 (1967). This "grant of power" has put the strip mine operator acting under a broad form deed in a preferred status which has derived solely from the government's allocation. As this Court wrote in *Nixon* v. *Condon*, 286 US 73 (1932), "If the State had not conferred it, there would hardly be color of right to give a basis for its exercise." at 85. If the Court of Appeals of Kentucky had not legalized the questioned activity, it could not be practiced. For there to be state action the challenged activity must be the specific exercise of power granted by the government. The decisions by Kentucky's highest court have actually increased the powers or status of the challenged activity. See *Burton* v. *Wilmington Parking Authority*, 365 US 715 (1961), Justice Stewart's concurrence at 726, Harlan's dissent at 728, 729. Statutes or judicial decisions that enlarge common law rights given a protected status amounts to authorization. See *Adickes* v. *Kress*, 398 US 144, 201-2 (1970), J. Brennan concurring and dissenting in part. Court enforcement of the right constitutes state action. *Shelley* v. *Kramer*, supra. See also *Bell* v. *Maryland*, 378 US 226 (1964), J. Goldberg concurring opinion, 296-300.

In *Reitman* v. *Mulkey*, supra, this Court made an analysis turning upon the nature of the protection afforded existing common law rights. The Court found state involvement in discrimination by private landlords by virtue of an amendment to the state constitution, adopted by state-wide referendum, protecting the absolute freedom of real property owners to refuse to sell, lease or rent residential properties to anyone and for any reason. The amendment effectively repealed fair housing laws, under which plaintiffs' allegations of dis-

crimination were raised. While the opinion suggested that the state had encouraged discrimination (387 US at 380), its position relied most heavily upon the constitutionalization of the right to discriminate.

> Private discriminations in housing were now not only free from the fair housing laws, but they also enjoyed a far different status than was true before passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter . . . *Reitman* at 376-77.

See also *Railway Employees' Dep't* v. *Hanson*, 351 US 225 (1956) and *Int'l Ass'n of Machinists* v. *Street*, 367 US 740 (1961), where the Court emphasized its constitutional concerns with Congress' involvement in union discrimination through statutes which codified the right of employees and employer to bargain for union shop, state statutes notwithstanding. This right to bargain for union shop was a common law right, but the protected status it acquired in Federal legislation superseding contrary state laws was decisive of government involvement. See also *Hunter* v. *Erickson*, 393 US 385 (1969).

II

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER STRIP MINING WHICH DESTROYS THE SURFACE OF THE LAND, WITHOUT THE SURFACE OWNER'S CONSENT, AND WHERE NO COMPENSATION IS PAID TO THE SURFACE LAND OWNER, CONSTITUTES AN UNJUST TAKING WITHOUT JUST COMPENSATION UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

What respondents' strip mining has done to the Watson land and what strip mining has done to the land throughout eastern Kentucky even after the so-called tough 1966 strip mine law was passed by the Kentucky General Assembly was aptly described by the Attorney General of Kentucky in an opinion to the Division of Reclamation (Opinion of Attorney General, OAG, 70-563, August 24, 1970). His office had conducted a fact-finding tour to ascertain the strip mine problem and stated:

> The basic nature of the steep slopes of eastern Kentucky suggests resistance to and in some instances, defiance of satisfactory containment and reclamation, as evidenced by slides, eroding and sliding mountainsides and disappearing silt-laden streams.
>
> Water damage was apparent from flooding and acid runoff sufficient to kill aquatic and wild life. The latter condition was more frequently observed in western Kentucky, and may well have generally antedated the 1966 amendments to the Act. Excess silting is a major consequence in eastern Kentucky . . .

At a site in Johnson County following a heavy rain, a mountain slide toppled a dwelling from its foundation so suddenly the occupants were unable to remove anything other than themselves.

In Knott County it was reported that a massive rock dislodged and rolled down the mountainside, crossing a public road and missing the regularly scheduled school bus on its daily run.

In Perry County near Lott's Creek a mountain slide filled a creek bed, flooded the bottom land to the floor level of a nearby dwelling, destroyed the channel and blocked the highway—again one travelled by school buses. At the time of the tour a crew was busily engaged with a shovel and dragline, bulldozer and chain saw, completing the reconstruction of a new channel, absent bend, bank or trees.

In Harlan County we were shown a creek where silt, rock and debris in the stream bed had risen to the level of the bridge crossing the creek.

In Leslie County members of the tour scaled to what once was a mountain top, to find no growing thing. The stripping operation was proceeding, layer-by-layer, seam-by-overburden-by-seam, with the residue cascading down the hillsides. At the first wash it could only fall to the bottoms below.

It was reported that on December 8, 1968, a landslide at Coal Rul, Kentucky, blocked the road for two months, diverting the creek into the bottom lands, necessitating the carrying in of food on foot across the slide.

As though by way of emphasis, on August 3, 1970, in Seco, Kentucky, a landslide was reported as spilling mud, water, rocks, tree stumps and other debris onto a roadway leading to Seco's residential sections. The landslide came, as silt basins washed out, just a few days after a protest petition against

> strip mining, signed by most of Seco's residents was submitted to the Reclamation Division. It was further reported that this situation arose despite the fact that the operators were in compliance with the Division's regulations . . . *OAG*, supra, pp. 781-782.

The attorney general's opinion on the horrible results of strip mining adequately describes what strip mining has done to the Watson land as well as what has happened to land throughout eastern Kentucky.

Under any of the several tests the courts have devised to determine what is a taking without just compensation, strip mining of the Watson land qualifies. The main theories developed are the physical invasion test and the diminution of value test. The physical invasion test includes both a strict and more relaxed view of what constitutes a physical invasion. The more stringent view dates back to the case of *Transportation Co.* v. *Chicago*, 99 US 635 (1878), where it was held that no taking of property occurs unless there is physical encroachment and occupation of the property. Another leading case which subscribed to this same theory was *United States* v. *Central Eureka Mining Co.*, 357 US 155 (1968). In this case the Court held that there was no physical invasion when the government closed down the gold mines because the government did not occupy, use or in any manner take physical possession of the gold mines.

The rigid test of physical invasion was often accompanied by a corollary proposition that the elimination of a noxious use did not constitute a taking, whereas the elimination of an innocent use did constitute a taking.

This theory was illustrated in *Mugler* v. *Kansas*, 123 US 623 (1887), where the Court held that the prohibition of the sale of liquor which destroyed the plaintiff's business was not a taking because there should be no compensation when a plaintiff is no longer permitted to carry on a noxious use.

The less stringent view of the physical invasion test was not a later development as might be expected, but rather ran right alongside in time sequence of the more stringent view. This view recognized that physical invasion was possible where actual physical occupation of the premises did not occur. The leading case is *Pumpelly* v. *Green Bay Co.*, 13 Wall 166 (1871), where a dam authorized by a state statute overflowed 640 acres of the plaintiff's land. The Court determined that there was a taking on the basis that there was serious interruption to the common and necessary use of the property. This theory was extended in *United States* v. *Kansas City Life Insurance Co.*, 339 US 799 (1950), where the United States had destroyed the agricultural value of the plaintiff's farm by keeping the Mississippi River at a high level. The Court held that the resulting destruction of the agricultural value of the land, without actually overflowing it, was a taking of private property. Two other cases involving overflights over people's homes advocated this same view of the physical invasion test. *United States* v. *Causby*, 328 US 256 (1946), *Griggs* v. *Allegheny County*, 269 US 84 (1962).

The second major test which the courts have used to determine what constitutes a taking is the diminution of value test. There are also two views of this test. The first view is that where there is a valid exercise of the police

power the diminution of value resulting from this exercise is inconsequential. The second view is that of a balancing between the police power and the resulting diminution of value and under this test when the harm becomes too great the act is deemed to be one of eminent domain, and compensation will be required.

This first test can be viewed as an absolute test as it will never allow compensation no matter how great the resulting injury is. The case of *Munn* v. *Illinois*, 94 US 113 (1876), was the first case to define the boundaries of the police power. The Court decided that where private property is devoted to a public use, it is subject to public regulations. The case of *C'Note* v. *City of New Orleans*, 177 US 587 (1901), held:

> The exercise of the police power often works pecuniary injury but the settled rule of the court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of police character . . . Such laws do not appropriate private property for public use but simply regulate its use and enjoyment by the owner . . . he will be compensated for it by sharing in the general benefit which the regulations are intended and calculated to secure. at pp. 598, 599.

The case of *Hadecheck* v. *Sebassion*, 239 US 394 (1916), affirmed the view of *C'Note* that regulation is not precluded by the fact that the value of the investment made in the business prior to any legislative action will be greatly diminished. *Village of Euclid* v. *Ambler Realty*, 272 US 365 (1926), followed the same type of reasoning in holding that a zoning ordinance was valid although it might have been held arbitrary and op-

pressive a century ago because of the complex conditions existing today.

The balancing as opposed to the absolute view of the diminution of value test has equal authority behind it. One of the first cases which followed this theory was *Interstate Consolidated Street Railway Co.* v. *Commonwealth of Mass.*, 207 US 79 (1907). In this case the Court found that a statute requiring a one-half rate for school children on the local railroad was a valid exercise of the police power, but the Court stated that if the magnitude of the burden imposed had been too great, compensation would have been required. This doctrine has been upheld in later cases. *Friendship Cemetery* v. *City of Baltimore*, 81 F.2d 57 (1951), *United States* v. *Central Eureka Mining Co.*, 357 US 155 (1958). In *Armstrong* v. *United States*, 364 US 40 (1950), the Court held that the complete destruction of one's property constituted a taking for which compensation was due. The taking resulted from the government's sovereign immunity which made the plaintiff's lien against property which the government had taken unenforcible, and therefore totally worthless.

The purpose of the taking without compensation clause of the Fifth Amendment as stated in three cases ranging from 1871 to 1960 seems to have remained fairly constant over the years. In *Pumpelly* v. *Green Bay Co.*, 13 Wall 166 (1871), the Court said that this constitutional provision was adopted for the protection and security of the individual against the government. In *United States* v. *Willow River Power Co.*, 324 US 499 (1946), the court said:

> The Fifth Amendment which requires just compensation where private property is taken for a public use undertakes to redistribute certain economic losses inflicted by public improvement so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. at p. 502.

And in 1960 the Court said the

> Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar the government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole. *Armstrong* v. *United States,* 364 US 40, 49 (1960).

See also Sax, "Takings and the Police Power," 74 Yale L.J. 36, 48 (1964). All of these statements about the taking clause of the Fifth Amendment seem to be saying that the amendment was intended to protect the individual from unjust loss.

The less stringent approach to the physical invasion test does not require actual possession or invasion of the property, but only requires that there be serious interruption to the command and necessary use of the property, or a direct and immediate interference with the use and enjoyment of the surface owner's property. The dust, landslides, pollution of the streams and creation of desert land where nothing can grow that result from strip mining have destroyed the Watson families' use and enjoyment of their property. Their home and the agricultural use of their land are almost destroyed; the contaminated water of nearby streams add to this destruction and their enjoyment of living in mountain

splendor has been destroyed after the stripping has gouged their land. The physical invasion cases of *Pumpelly* v. *Green Bay Co.*, 13 Wall 166 (1871), and of *United States* v. *Kansas City Life Insurance Co.*, 339 US 799 (1950), where the destruction of agricultural land were deemed to be takings of property are analogous to the strip mining situations. The overflight cases of *United States* v. *Causby*, supra, and of *Griggs* v. *Allegheny County*, supra, are also similar to this situation as the harms of the overflights includes nervousness and fear on the part of the inhabitants, just as strip mining on the hill above one's home in terms of noise, dirt and the possible dangers that will result, cause similar fear and nervousness on the part of the Watson family.

The diminution of value test in terms of the balancing approach is also easily met. This test requires that the value of the property be devalued to a large extent in order to find that there has been a taking of property. Land that has been strip mined loses all if not most of its value. In terms of resale value it is unlikely that anyone would buy gouged out land, where landslides occur frequently, where nearby streams are polluted and where even the flat land has lost any possibility of agricultural use. In terms of the value in the owner's eyes, it is obvious that he can no longer use the land for agricultural purposes or the nearby streams for fishing or water purposes, and it is likely that his enjoyment of what was once beautiful countryside will have diminished greatly.

After examining both of these tests in light of the facts, it is obvious that the tests are almost identical in a situation like the present case. They both boil down to the same fact that the Watson family does not own what

they once owned before their land was raped by the coal companies. They no longer have either the use or the enjoyment of their property and its value is greatly diminished. For all practical purposes, the result is the same as if the land had been physicially taken from them. The only logical conclusion is that strip mining per se constitutes a taking without compensation within the meaning of the Fifth Amendment.

CONCLUSION

The Watson family respectfully urges that this Court grant certiorari to review these serious and important issues that not only affect them but also reach hundreds of citizens of eastern Kentucky and may perhaps affect the lives of other citizens in other states in the near future.

Respectfully submitted,

WILLIAM A. ALLISON, JR.
3208 West Broadway
Louisville, Kentucky 40211
Attorney for Petitioner